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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 956.

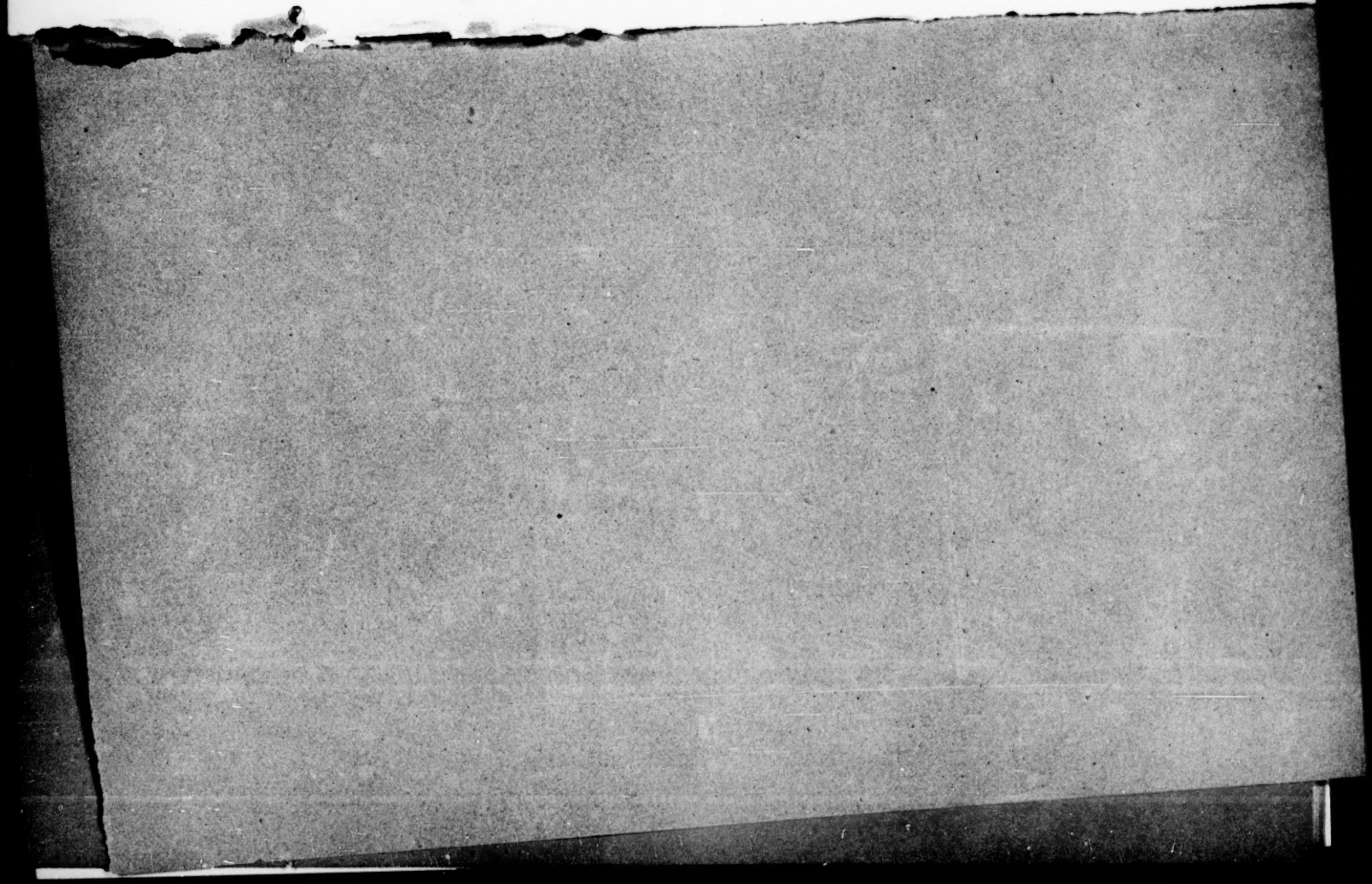
FRANK O. KIHLBERG, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 30, 1878.



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1 In the Court of Claims, December term, 1875.

I.—*Petition.*—*Filed June* 18, 1877. A. H.

FRANK O. KIHLBERG }
vs.
THE UNITED STATES. }

The petition of Frank O. Kihlberg, a citizen of the United States, respectfully represents:

That on the 31st day of January, 1870, he entered into a contract in writing with Major-General L. C. Easton, deputy quartermaster-general United States Army, acting for and on behalf of the United States.

A copy of said contract is hereto annexed, and petitioner prays may be read and considered by the court as part of his petition.

Petitioner shows that he carried out and fully performed on his part all of the obligations of said contract, and that, in pursuance of requirements made upon him in pursuance thereof, he transported a large amount of freight between the following-named places, viz:

From Fort Hays to Fort Dodge;
From Fort Hays to Camp Supply;
From Fort Hays to Fort Larned;
From Fort Harker to Fort Sill;
From Kit Carson to Fort Union; and
From Kit Carson to Fort Lyon.

2 Petitioner shows that for the freight thus transported the United *Stated* States is still indebted to him as follows, viz:

For transporting, at contract rate, between Fort Hays and Fort Dodge, 1,551,704 pounds of supplies a distance of 8.078 miles	$1,505 36
For transporting, at contract rate, between Fort Hays and Camp Supply, 2,347,046 pounds of supplies a distance of $8\frac{7}{10}$ miles	2,333 52
For transporting between Fort Hays and Fort Larned, at contract rate, 68,659 pounds a distance of eleven miles	91 68
For transporting between Fort Hays and Camp Supply, at contract rate, 4,785 pounds of supplies a distance of $174\frac{7}{10}$ miles	94 18
For transporting between Fort Hays and Fort Dodge 8,525 pounds of supplies a distance of 88.078 miles	87 35
For transporting between Fort Harker and Fort Sill 5,175 pounds of supplies a distance of 329 miles	227 92
For transporting between Kit Carson and Fort Union, government supplies, 5,926 pounds a distance of 273 miles, and 3,055 pounds a distance of 263 miles	257 91
For transporting between Kit Carson and Fort Lyon 762 pounds of supplies a distance of 53 miles	4 62
For amount of claimants' credits withheld on bill of lading, Fort Sill train No. 8	608 99
Total amount due	$5,211 53

for which sum petitioner prays judgment of this honorable court.

Petitioner shows that in the event of a recovery from the United States he will be required to pay over to Samuel D. Irwin, John N. Irwin,

3 and James N. Piper their respective portions of the amount recovered, they having been associated with petitioner in the performance of said service.

And petitioner further shows that Samuel D. Irwin, John N. Irwin, James N. Piper, and William R. Bernard became interested in the said claim when the service was performed, and upon consideration of their association with petitioner in furnishing the necessary capital and labor to perform said service; and that on or before November 2, 1876, William

R. Bernard transferred his interest to James N. Piper for a valuable consideration, and he says that the agreement, under which the parties named aided in the performance of said contract and shared in the compensation therefor, was made before petitioner signed the contract with the United States annexed to the petition.

HARVEY SPALDING,
Attorney for Claimants.

Harvey Spalding, being duly sworn, deposes that he is attorney for the claimant in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition is stated; that the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

HARVEY SPALDING.

Subscribed and sworn to before me this 23d day of May, 1877.
[SEAL.] GEORGE W. BAGG,
Notary Public, D. C.

Address of claimant, Kansas City, Mo.
Address of claimant's solicitor, Harvey Spalding, Washington, D. C.

4 EXHIBIT A.

Contract for route No. 2 for 1870–'71.

This agreement made and entered into this thirty-first day of January, one thousand eight and seventy, by and between Brevet Major General L. C. Easton, deputy quartermaster-general, U. S. Army, chief quartermaster Department of the Missouri, for and on behalf of the United States, of the first part, and Frank O. Kihlberg, of Kansas City, Jackson County, in the State of Missouri, of the second part, for himself, his heirs, executors, and administrators, witnesseth:

That the said parties have covenanted and agreed, and by these presents do covenant and agree, to and with each other as follows, viz:

ARTICLE I. That the said Frank O. Kihlberg shall receive at any time, in any of the months from April 1st, 1870, to March 31st, 1871, inclusive, from the officers or agents of the quartermaster's department at such points on the Kansas Pacific Railway as may, during the existence of this contract, be designated by the said chief quartermaster of the Department of the Missouri, or his successor in office, all such military, Indian, and government stores and supplies as may be offered or turned over to him for transportation in good order and condition by the officer or agent of the Quartermaster's Department at any or all of the above points or places, and transport the same with dispatch, and deliver them, in like good order and condition, to the officer or agent of the Quartermaster's Department on duty or designated to receive them, at any places that may be designated by the forwarding officer in the State of Kansas and Territory of Colorado, south of latitude forty (40) degrees north, and in such portions of the State of Texas and Indian Territory as lie north of the Red River and west of longitude ninety-seven (97) degrees, and at Fort Union, New Mexico, or other depot that may be designated in that Territory, and to any other points on the route to that depot, agreeably to the instructions he may receive from the officer or other authorized agent of the Quartermaster's Department charged with

the duty of forwarding the stores and supplies at the place of departure; and for the faithful performance of such service he shall be paid in the manner hereinafter provided for in Article XVII of this agreement, and at the rates specified and shown in the tabular statement hereto annexed and signed by the parties to this agreement, which statement is considered as part hereof.

ARTICLE II. That the said Frank O. Kihlberg agrees and binds himself, his heirs, executors, and administrators, to transport, under this agreement, from and to the posts, depots, or stations named in Article I, or from and to any other posts, depots, or stations that may be established within the district described in said article, any number of pounds of military, Indian, and government stores and supplies, from and between one hundred thousand pounds and ten millions of pounds, in the aggregate.

ARTICLE III. The said Frank O. Kihlberg agrees and binds himself to have at Sheridan, Kansas, or any other starting point on the route that may be agreed upon by the parties to this agreement, a place of business or agency, and for all stores to be transported under this agreement notice shall be given the said Frank O. Kihlberg at said place of business or agency.

ARTICLE IV. In order that the said Frank O. Kihlberg may be in readiness to meet the demands and requirements made upon him for transportation under this contract and agreement, written notice shall be given him, or his agent, of the quantity and kind of stores to be transported at any one time, at what point the stores will be ready for delivery to him, and the place of their destination, subject to such changes as may be decided upon while in transitu, as herein provided for; that is to say, for any quantity less than three hundred thousand pounds, fifteen days' notice; for any quantity between three hundred thousand and six hundred thousand pounds, twenty days' notice; for any quantity between six hundred thousand and one million of pounds, thirty days' notice; for any quantity between one million of pounds and two million five hundred thousand pounds, forty days' notice; for any quantity between two million five hundred thousand pounds and five millions of pounds, fifty days' notice; for any quantity between five millions of pounds and ten millions of pounds, sixty days' notice; for any quantity between ten millions of pounds and twenty millions of pounds, seventy days' notice. It is also understood that no two of the said notices shall take effect within ten days of each other.

ARTICLE V. The military, Indian, and government stores and supplies which shall be transported under this agreement shall be consigned to their respective destinations, and receipts on bills of lading shall be given by the officer of the Quartermaster's Department serving at the place of consignment for the full quantity of stores that shall be delivered, and, upon such receipts, payment shall be made to the said Frank O. Kihlberg as hereinafter provided.

ARTICLE VI. That all the means of transportation to be used by the said Frank O. Kihlberg, under this agreement, shall be submitted to the inspection of the officer or agent of the Quartermaster's Department at the place of departure, and such only shall be used as may be then and there accepted by him. The stores turned over to the said Frank O. Kihlberg for transportation shall be transported in trains of not less than twenty-five wagons each, whenever the officer or agent of the Quartermaster's Department at the point of starting shall turn over a sufficient quantity of stores to make up the loading of that number of wagons, and in all cases the stores turned over for transportation shall

be delivered to the consignee by the contractor in the same lots or invoices as received at points of departure.

ARTICLE VII. That to insure the delivery of the stores, and to aid the contractor in the execution of his agreement, certificates, setting forth the number of the train, the number of wagons in it, and the condition of the train for the prosecution of its journey, shall be given by the officers or agents of the Quartermaster's Department at Fort Lyon, when that post is on the route to the destination of the train.

Upon each certificate so given, setting forth the good condition of the train, payment shall be made to the contractor for the service rendered to that point, and upon the arrival of the train at its place of destination or delivery, the officer of the Quartermaster's Department at the point of delivery shall indorse the bill of lading in accordance with the finding of a board of survey, as hereinafter provided, stating the quantity and condition of the stores delivered, upon which indorsement payment shall be made as per contract, deducting the amount of any payment or payments previously made, and also for any articles missing, lost, destroyed, or damaged, and which the board of survey may find to be properly chargeable to the contractor, at the rate specified in Article VIII of this agreement.

ARTICLE VIII. In all cases when stores have been transported by the said Frank O. Kihlberg, under this agreement, a board of survey, to be applied for in writing by the contractor or his agent (one member 7 of which board shall be, if practicable, an officer on duty in the Subsistence Department), shall be called without delay, on their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported, and, in cases of loss, deficiency, or damage, to investigate the facts, and report the apparent causes, assess the amount of loss, deficiency, or damage, and state whether it was attributable to neglect or want of proper care on the part of the contractor, or to causes beyond his control, and these proceedings, a copy of which shall be furnished to the contractor, shall be attached to the bill of lading, and shall govern the payments to be made on it.

For loss of weight, due to shrinkage, and for leakage of vinegar, molasses, or other liquids, the contractor shall not be held liable if the packages are delivered in good order and condition and the board of survey shall be satisfied that such shrinkage or leakage did not arise from neglect or want of care on the part of the contractor or his agent. For loss, deficiency, or damage, attributable to the contractor, he shall pay double the cost at the point where he receives the articles, which cost shall be determined by taking the cost price at place of purchase and adding thereto the cost of transportation to the point where the stores were turned over to the contractor; and no freight whatever shall be paid on stores deficient. In case of damage, freight shall be deducted in proportion to the quantity damaged. Should no board of survey be called, when requested by contractor, through failure on the part of the Quartermaster's Department or other military authority to have one convened, it shall be considered that the contractor has delivered all the stores as specified in the bill of lading in good order and condition, and he shall be paid accordingly. But before such payment is made the fact must be shown that the contractor or his agent did make application in writing to the quartermaster for a board of survey. If the amount of loss, deficiency or damage exceeds the value of the bill of lading, it shall be deducted from any after payment that may become due.

Transportation to be paid in all cases according to the distance from the place of departure to that of delivery, the distance to be ascertained

and fixed by the chief quartermaster of the district of New Mexico, and in no case to exceed the distance by the usual and customary route.

8 Where, however, stores are taken from trains before reaching their destination by competent military authority, the contractor will be allowed an increase of pay of five per cent. on contract rates to points of actual delivery; provided, that in no case more than the regular rates for the whole distance are paid.

ARTICLE IX. That in case any one or more of the trains of the said Frank O. Kihlberg are stopped or delayed at any place any time exceeding two days, either by the orders of an officer or agent of the Quartermaster's Department or the commanding officer of a post or of troops present, or by failure of the proper officer to convene a board of survey when requested by contractor in writing, the contractor shall be paid, upon a statement in writing procured from the officer or agent of the government causing the delay, the sum of five dollars per diem for each and every team in the train for each and every day they may be so delayed.

But no such payments shall be made when the order for the stoppage of a train or any portion thereof is given because of the inability of the contractor to proceed with the said train or any portion thereof by reason of deficiency in quantity or quality of means of transportation or by any act or fault of his. In case the officer or agent of the government aforesaid shall refuse to furnish the statement in writing above referred to, then the delay shall be paid for as above on the affidavits or other satisfactory evidence of credible and competent witnesses.

All orders from officers or agents of the government to halt trains shall be given to the contractor or his agent in writing, expressing fully the reasons therefor; provided, that when such delay is occasioned by proper military authority for the protection of the trains, the delay shall not entitle the contractor to any compensation, but the time so lost shall be allowed to him in computing the time of the trip.

ARTICLE X. The said Frank O. Kihlberg shall be furnished, on application to post-commander, with a suitable escort for the protection of the supplies, should he be required to transport in any one train a less quantity than one hundred and twenty-five thousand pounds.

ARTICLE XI. That the said Frank O. Kihlberg shall transport all the military, Indian, and government stores and supplies for which the Quartermaster's Department may require wagon transportation by contract, on the route specified by this agreement, during the year

9 ending March 31, 1871, provided the weight of such stores and supplies shall not exceed in the aggregate ten millions of pounds; yet nothing herein shall be so construed as to forbid or prevent the United States from using its own means of transportation for such service whenever it may be deemed advisable to do so.

ARTICLE XII. That all stores shall be delivered in a reasonable time after being turned over to the contractor, not to exceed ten days per hundred miles for mule trains, and fourteen days per hundred miles for ox trains, from the time of starting, unless detained by orders en route, which must be produced; and in determining the date of starting, the date of bill of lading shall govern, and the bill of lading shall bear date on the completion of the loading of the train, and the contractor shall be allowed for loading not to exceed two days for each train of twenty-five wagons, and in that proportion for any greater or less number of wagons, from the time the stores are turned over to the contractor for transportation, as provided for in Articles I and IV of this agreement.

Any delay beyond such time as specified to be charged to the con-

tractor, at the rate allowed for delay caused by orders, as provided in Article IX of this agreement, unless such delay arises from causes beyond the control of the contractor, and so determined by a board of survey; provided, that in the case of trains starting in the months of November, December, January, February, and March, and destined to points not more than one hundred and fifty miles from the point of starting, the contractor shall not be chargeable for any delay beyond the time specified in this article, unless it shall appear that such delay arose from causes within his control.

ARTICLE XIII. That in case of failure, by reason of deficiency in the quality or quantity of the means of transportation furnished, or from any other cause on the part of the said Frank O. Kihlberg to be in readiness to meet the demand and requirements made upon him for transportation under this contract or agreement, after due notice shall have been given him or his agents, as provided in Article IV of this agreement, then the chief quartermaster of the department or district shall have power to supply the deficiency either by purchase, hire, special contract, or the use of government transportation, as the said officer may elect, and the said Frank O. Kihlberg shall be charged with the additional cost or expense thus incurred over the rates of this contract; and in the case of the use of government transportation, the additional cost or expense shall be considered to be one-fourth of the sum which, under the contract, would be payable under the service—the rate to be that of the month in which the stores are started by the government transportation.

ARTICLE XIV. It is understood that if at any time stores or supplies are required to be transported back to any point on the road, or to any of the original points of departure, or from one point to another within the route, they shall be carried upon the same terms and conditions as herein provided.

ARTICLE XV. It is understood that the government will, whenever it is deemed advisable, contract for forage to be delivered at any of the posts within the territory described in Article I.

ARTICLE XVI. It is distinctly understood that should any of the supplies, while in the hands of the contractor, be transported by rail over any portion of the route, the government will pay the rates the contractor pays for said transportation, and nothing more.

ARTICLE XVII. For and in consideration of the faithful performance of the stipulations of this agreement, the said Frank O. Kihlberg shall be paid at the office of the depot quartermaster at Fort Leavenworth, Kansas, in the legal currency of the United States, according to the distance supplies are transported, and agreeably to the rates specified in the tabular statement hereto annexed, signed by the parties to this agreement.

ARTICLE XVIII. It is expressly agreed and stipulated between the parties to this contract that, upon mutual agreement, it may be changed, altered, modified, or abrogated, in whole or in part; but no such change, alteration, modification, or abrogation shall be interpreted as entitling the contractor to increased rates of compensation over the rates herein specified.

ARTICLE XIX. It is expressly understood that no member of Congress, officer, agent, or employee of the government, shall be admitted to any share or part in this contract or agreement, or derive any benefit to arise therefrom.

ARTICLE XX. This contract is made subject to the approval of the

commanding officer of the Department of the Missouri, and of the commanding officer of the Military Division of the Missouri.

In witness whereof the undersigned have hereunto placed
11 their hands and seals, at St. Louis, Missouri, the day and date first above written.

L. C. EASTON, [SEAL.]
Deputy Quartermaster-General, U. S. A.,
Chief Quartermaster Department of the Missouri.

Witness:
CHARLES SPINGER.

FRANK O. KIHLBERG. [SEAL.]

O. C. SPOOR.

Tabular statement.

Schedule of prices per one hundred (100) pounds per one hundred (100) miles to be paid Frank O. Kihlberg, contractor for the transportation of military, Indian, and government stores and supplies, under an agreement between Brevet Major-General L. C. Easton, deputy quartermaster-general, U. S. Army, chief quartermaster Department of the Missouri, acting on behalf of the United States, and the said Frank O. Kihlberg, dated Saint Louis, Missouri, the thirty-first day of January, 1870.

Schedule of prices.

Points of starting.	Periods of starting.											
	1870.									1871.		
From and to places named in Article I of above agreement.	April.	May.	June.	July.	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.
	$0 95	$1 09	$1 12	$1 09	$1 08	$1 15	$1 20	$1 30	$1 50	$1 40	$1 20	$1 10

L. C. EASTON, [SEAL.]
Deputy Quartermaster-General, A. S. A.,
Chief Quartermaster Department of the Missouri.

Witness:
CHARLES SPINGER.

FRANK O. KIHLBERG. [SEAL.]

O. C. SPOOR.

12 *Note.*

The foregoing petition was, on motion of the claimant, substituted by the court on the 18th day of June, 1877, for petition No. 9852, which was filed August 31st, 1874.

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

13 II.—*Traverse.—Filed Nov.* 23, 1877.

And now comes the Attorney-General on behalf of the United States and answering the petition of the claimant her'in, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that said claimant has

at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

14 III.—*Plea of set off.—Filed Dec.* 7, 1877.

And now comes the defendants, by their Attorney-General, and say that said claimant is indebted to them in the sum of $608.99 for work, labor, and services performed by said defendants, by their servants and teams, in January, 1871, for and on behalf of and to the benefit and advantage of said claimant, and at his instance and request and with his consent, in transporting military stores from a point on the contract-route of said claimant mentioned in the petition in this cause, to Fort Sill, and for forage of men and teams while so employed, the items of which claim are as follows, to wit:

Statement of charges against Frank O. Kihlberg, transportation-contractor, by Capt. A. F. Rockwell, A. Q. M., U. S. A., at Fort Sill, I. T.

January 3 to January 8, 1871, inclusive, for use of ten six-mule public teams, assisting the transportation of stores to this post.

January 3 to January 16, 1871, inclusive, five six-mule public teams, as above.

Six days' forage for 10 teams, 3,240 pounds corn; ten days' forage for 5 teams, 2,700 pounds corn; being 5,940 pounds of corn, at $3.39 per 100 pounds	$201 66
Pay of teamsters, being 130 days, at 83⅓ cents	108 33
Rations for teamsters, 130 days, at 30 cents per day	39 00
For use of teams, at $2 a day each	260 00
	608 99

Which they will set off against any demands of claimant, and for which they pray judgment.

THOMAS SIMONS,
Assistant Attorney-General.

15 IV.—*Findings of fact and conclusions of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. The contract subjoined to the claimant's petition as Exhibit A was entered into as alleged in the petition.

II. On the 16th of June, 1870, the chief quartermaster of the Department of the Missouri addressed to the department quartermaster at Fort Leavenworth, Kans., the following letter:

HEADQRS. DEPT. OF THE MO., CHF. QRMR. OFF.,
St. Louis, Mo., June 16, 1870.

Lt. Col. J. M. MOORE,
Dep't Qrmr., Fort Leavenworth, Kan.:

SIR: The following distances are furnished you for your government

in making settlements under the contract of F. O. Kihlberg, dated January 31st, 1870, for transportation:

From—	To—	Number of miles.	Authorities.
* * *	* * *	* * * *	* * *
Fort Hays, Kans....	Fort Larned, Kans.....	Forty-one (41).....	Lieut. Cook.
" " "	" Dodge, "	Eighty (80).....	Capt. Graham.
" " "	Camp Supply, Ind. Ty...	One hundred & sixty-six (166).....	Capt. Graham and Lt. Orleman.
" Dodge, "	" " "	Eight-six (86)	Lt. Orleman.

Distances from Kit Carson, C. Ty., will be furnished you as soon as ascertained.

Very respectfully, your obedient servant,

L. C. EASTON,
Deputy Q. M. General, C. Q. M.

III. On or about the 30th of June, 1870, the agent of the claimant was having his first settlement with Col. James M. Moore, quartermaster at Fort Leavenworth, for transportation done under said contract between Fort Hays and Camp Supply, when said Moore informed the agent that the chief quartermaster had instructed him to pay for 80 miles from Hays to Dodge, and for 166 miles from Hays to Camp Supply. The agent protested that those distances were not satisfactory, and refused to receive payment without assurance that it should not prejudice the contractor's claim for greater distances, if the greater distances claimed should be ascertained to be correct, which distances the information then in the possession of the contractor and the agent indicated to be, from Hays to Dodge, 86 miles; from Hays to Camp Supply, 181 miles; and from Hays to Larned, 52 miles. The said Moore referred the agent to the chief quartermaster, who assured the agent that, should the
16 distance be ascertained to be what the latter claimed, payment would be made accordingly; and that the settlement made at the time of these conversations should be no bar or prejudice against such payment for work already done or to be done. On the 5th of August, 1870, after payments had been made to the claimant through the said agent for transportation from Hays to Dodge, and from Hays to Camp Supply, the agent again saw the chief quartermaster, who informed him that he had corresponded with the officers at Fort Hays, and was satisfied that the distances he had instructed Colonel Moore to settle for were correct. It does not appear that prior to August 5, 1870, th*h*re had been any actual measurement of the road from Fort Hays to Fort Dodge, or of that from Hays to Larned.

IV. During the period of time covered by said contract, the distance, by an air-line, from Hays to Dodge was 84 miles and 50 chains; and from Hays to Larned, by an air-line, 47 miles and 30 chains; and the road between Hays and Dodge, and that between Hays and Larned, were each two miles longer than the air-line distances named. At the trial the claimant admitted that the distance from Dodge to Camp Supply, as stated in the letter of the chief quartermaster, set forth in finding II, was correct.

V. Under said contract, from time to time, stores were delivered to the claimant at Fort Hays for transportation to Fort Dodge, the total weight of all of which, when so delivered to him, was 1,560,242 pounds.

Of that quantity the claimant delivered at Dodge 1,551,714 pounds.

The deficiency of 8,528 pounds was found by boards of survey, constituted as required by said contract, to be attributable not to neglect or want of proper care on the part of the claimant, but to causes beyond his control, namely, unavoidable shrinkage, wastage, or drying up of solid stores, and unavoidable leakage of vinegar, molasses, and other liquids. Upon this deficiency no freight has been paid to the claimant but he was paid the contract price for the number of pounds actually delivered at Fort Dodge, as above stated, upon the basis of a distance of 80 miles from Hays to Dodge.

VI. Under said contract, from time to time, stores were delivered to the claimant at Fort Hays for transportation to Camp Supply, the total weight of all of which, when so delivered to him, was 2,353,283 pounds. Of this the claimant delivered at Camp Supply 2,347,046 pounds.

Of the deficiency of 6,227 pounds, the claimant was charged with and paid for 1,452 pounds, according to the terms of the contract, and as to the remainder of 4,785 pounds it was found by boards of survey, constituted as required by said contract, that it was attributable not to neglect or want of proper care on the part of the claimant, but to causes beyond his control, namely, unavoidable shrinkage, wastage, or drying up of solid stores, and unavoidable leakage of vinegar, molasses, and other liquids.

Upon this deficiency of 4,785 pounds no freight has been paid to the claimant; but he was paid the contract price for the number of pounds actually delivered at Camp Supply, as above stated, upon the basis of a distance of 166 miles from Hays to Camp Supply.

VII. Under said contract, stores were delivered to the claimant at Fort Hays, for transportation to Fort Larned, the weight of which, when so delivered to him, was 68,659 pounds; all of which stores were delivered at Larned, and the claimant was paid the contract price therefor, upon the basis of a distance of 41 miles from Hays to Larned.

VIII. Under said contract, from time to time, stores were delivered to the claimant for transportation from Kit Carson, Colorado, to Fort Union, New Mexico, and from Kit Carson to Fort Lyon, Colorado, and
17 from Fort Harker, Kansas, to Fort Sill, Indian Territory. At each of those points of delivery, when the claimant's trains arrived there, a board of survey, organized in conformity with said contract, found deficiencies in the weight of the stores transported and delivered, not attributable to neglect or want of proper care on the part of the claimant, but to unavoidable shrinkage, wastage, or drying up of solid stores, and unavoidable leakage of vinegar, molasses, and other liquids; and in no case was the claimant paid anything for the transportation of the quantity so found deficient, but was in each case paid only for the number of pounds of stores actually delivered.

The first occasion when the attention of the claimant or of his agent was called to the fact of the refusal of Colonel Moore to pay anything on account of the transportation of the quantities so found deficient was in July, 1870, when the agent protested to him and also to the chief quartermaster that such deductions were not properly chargeable to the claimant, except in cases where boards of survey reported such losses of weight to be the fault of, and justly chargeable to, the claimant; and at the same time the agent notified the chief quartermaster that if not paid he would prosecute a claim therefor against the government.

The payments to the claimant for transportation between the points above named in this finding were made on the basis of the following distances:

From Kit Carson to Union, partly 273 miles, and partly 263 miles; from Kit Carson to Lyon, 53 miles; and from Harker to Sill, 329 miles.

The total number of pounds of such deficiencies, for transportation of which payment was refused, was as follows:

From Kit Carson to Union, in cases where delivered stores of the same shipment were paid for on the basis of 273 miles, 5,952 pounds; and in cases where delivered stores of the same shipments were paid for on the basis of 263 miles, 3,055 pounds; from Kit Carson to Lyon, 762 pounds; and from Harker to Sill, 5,245 pounds.

IX. On the 27th of October, 1870, under said contract, stores of the weight of 147,531 pounds were delivered to the claimant at Fort Harker, to be transported to and delivered at Fort Sill; and the arrival at Sill of the train conveying the same, which was an ox-train, was delayed until the 4th of March, 1871, by swollen streams, heavy snow-storms, and the unusually bad condition of the roads, making it necessary to unload a portion of the stores and double the teams on the remainder.

Owing to this long delay of this train the post at Fort Sill became short in supplies, and, to assist in hastening them, the post commander and quartermaster at that post, on the 3d of January, 1871, ordered fifteen mule-teams to go and meet the claimant's train; and said teams did go and meet the claimant's train, and did assist it, by taking stores therefrom to Sill, which arrived there before the claimant's train, and so afforded relief to the post till the claimant's train arrived. The claimant made no request to have said mule-teams so sent, nor did he make any objection to their taking of stores from his train.

In a settlement made on the 22d of June, 1871, by the claimant's agent with Colonel Moore aforesaid, for other transportation done by the claimant between Harker and Sill, the said Moore caused to be deducted from the amount due the claimant therefor the sum of $608.99 charged against him, in connection with the assistance afforded by said fifteen teams, as set forth in the following statement:

18 *Statement of charges against Frank O. Kilberg, transportation contractor, by Capt. A. F. Rockwell, A. Q. M., U. S. A., at Fort Sill, I. T.*

Date.	On what account.	
Jan'y 3d to 8th, 1871, incl.	For use of ten (10) six-mule public teams, assisting in the transportation of stores to this post.	
Jan'y 3d to 16th, 1871, incl.	For use of five (5) six-mule public teams, as above.	
	The whole itemized as follows:	
	6 days' forage for 10 teams (60 mules), 3,240 p'ds corn... }	
	10 " " " 5 " (30 "), 2,700 " " ... }	$201 66
	Being 5,940 p'ds of corn at $3.39½ per 100 p'ds..... }	
	Pay of teamsters, being 130 days @ $3¼ per day.....	$108 33
	Rations for 130 days, @ 30c. per day (teamsters).....	39 00
	For use of teams, at $2.00 per day for each team	$260 00
	Total, six hundred eight & $\frac{99}{100}$ dollars.....	$608 99
	The 10 teams were out 6 days on the trip.	
	" 5 " " " 14 " " " " "	

A. F. ROCKWELL,
Captain & A. Q. M., U. S. A.

FORT SILL, I. T., *May* 13, 1871.

The claimant's agent objected and protested against the deduction of this sum from what was due him when the deduction was made, because

the bills of lading against which it was alleged to be chargeable, namely, those covering the stores shipped on the 27th of October, 1870, had been receipted in full and settled May 5, 1871.

19 CONCLUSIONS OF LAW.

Upon the foregoing facts the conclusions of law reached by the court are as follows:

1. The claimant is not entitled to recover anything for increased compensation for transportation of supplies.

2. The claimant is not entitled to recover anything on account of the transportation of that portion of the weight of supplies which was lost between the place of shipment and that of delivery by unavoidable shrinkage, wastage, or drying up of solid stores, and unavoidable leakage of fluids.

3. The claimant is entitled to recover the six hundred and eight dollars and ninety-nine cents withheld from him, as stated in finding IX.

The grounds of these conclusions are set forth in the opinion of the court.

20 V.—*Requests of the claimant for additional findings of facts and rulings thereon.*

Now comes the said claimant, by Harvey Spalding, the solicitor, and requests the court to find additional facts as follows:

That the supplies transported from Fort Hays to Camp Supply, mentioned in the sixth finding, were transported by the way of Fort Dodge, and that the distance of 166 miles for which transportation has been paid was computed as follows: From Fort Hays to Fort Dodge, 80 miles, and from Fort Dodge to Camp Supply, 86 miles; and that the supplies, actual weight, delivered at Camp Supply were transported six miles and fifty chains, as explained in finding four, for which transportation has not been paid.

HARVEY SPALDING.

Ruling allowed.

21 Now comes the said claimant, by his solicitor, Harvey Spalding, and requests the court to find that the chief quartermaster Department of the Missouri ascertained and fixed the distance from Fort Hays to Fort Larned at 49 miles, from Fort Hays to Fort Dodge at 85 miles, and from Fort Hays to Camp Supply at 171 miles.

HARVEY SPALDING.

Ruling refused, because inconsistent with the facts found by the court.

22 VI.—*Defendant's request for additional findings, and ruling of the court thereon.*

And now comes the Attorney-General on behalf of the United States, and requests the court to make the following findings:

I. That by direction of the officer then in command of the Department of the Mo., Capt. G. W. Graham, 10th Cavalry, on or about the 9th day of April, 1868, measured the distance between Fort Hays and Fort Dodge, and found the distance to be 80 miles and 72 feet, and information of this measurement was on or about the 11th day of November, 1868, forwarded by the acting chief quartermaster of that depart-

ment to the depot quartermaster at Fort Leavenworth, Kansas, the disbursing quartermaster instructing him that said distance should govern in making settlements for transportation under the contract then existing.

II. That in pursuance of instructions from Capt. A. S. Kimball, then acting quartermaster at Fort Hays, Kansas, Lt. L. W. Cooke, 3rd U. S. Infantry, on or about December 26, 1869, measured the distance between Fort Hays and Fort Larned, and found it to be 41 miles 57 rods
23 5 feet and 8 inches, which information was communicated to Gen- Easton, chief quartermaster of department, on or about Decem. ber 30, 1869.

THOMAS SIMONS,
Ass't Att'y-Gen.

A. D. R.

Ruling on the foregoing requests.

These requests are refused, because statements of evidence.

24 VII.—*Opinion of the court and dissenting opinion.*

DRAKE, Ch. J., delivered the opinion of the court:

Under the contract sued on the claimant makes three demands:

I. The first is for increased compensation for transportation of supplies under the contract, claimed on the ground that the distances traveled by his trains in performing the transportation were greater than those for which he was paid.

For transportation from Fort Hays to Fort Larned he was paid for a distance of 41 miles, when the court finds that the air-line distance between these forts was 47 miles and 30 chains, and the traveled road was two miles longer.

For transportation from Fort Hays to Fort Dodge he was paid for a distance of 80 miles, when the court finds that the air-line distance between these forts was 84 miles and 50 chains, and the traveled road was two miles longer.

For the transportation from Fort Hays to Camp Supply he was paid for a distance of 166 miles. The road between these points passed by Fort Dodge, and the claimant admits that the distance allowed for that portion of it between Fort Dodge and Camp Supply, namely, 86 miles, was correct; but he insists that he is entitled to pay for the greater distance of 6 miles and 50 chains between Hays and Dodge than he was paid for.

The claim, then, is for compensation for 9 miles and 30 chains between Hays and Larned; for 6 miles and 50 chains between Hays and Dodge; and for a like distance between Hays and Camp Supply.

If the contract required that he should be paid according to the distance actually traveled by his trains, we should have no difficulty in awarding a judgment for compensation for those greater distances; but such is not the case. The stipulation in the contract governing the matter of payments is in these words:

"Transportation to be paid in all cases according to the distance from the place of departure to that of delivery; the distance to be ascertained and fixed by the chief quartermaster of the Department of the Missouri, and in no case to exceed the distance by the usual and customary route."

The mere perusal of this stipulation can leave no question in the mind that the claimant agreed to be paid for such distances only as should be "ascertained and fixed by the chief quartermaster of the De-

partment of the Missouri"; and it is found by the court that that officer, before any transportation had been performed, fixed the distances to be paid for, and that the claimant was paid according to that fixation. And when, in consequence of the objection of the claimant's agent that the distances so fixed were too short, the matter was subsequently again brought before the chief quartermaster, he corresponded with officers at Fort Hays, and declared himself satisfied that the distances he had at first fixed were correct.

Under these circumstances there would seem to be no recourse
25 for the claimant against that officer's decision, though it was in fact an erroneous one.

At the trial, however, the claimant's counsel urged that the chief quartermaster, though he had fixed, had not legally ascertained, the distances.

We do not perceive exactly what is meant by a legal ascertainment in such a case. We have been referred to no law prescribing any mode of ascertainment, or any description or quality of evidence upon which the ascertainment should be based. Upon what evidence or by what process of computation the officer should ascertain the distances was left wholly to him to determine, and neither the claimant, nor this court, nor any other tribunal could review his judgment on that point and substitute another ascertainment.

Laying aside, then, the question of the legality of his ascertainment, we come to the simple point whether he made any ascertainment at all; and upon this the facts found do not, as we conceive, admit of a doubt. It was his official duty to make such ascertainment, and the law will presume that, before he fixed the distances, he had, in some way that satisfied his own judgment and sense of duty, ascertained to his own satisfaction that the distances he fixed were correct. And when, on the appeal of the claimant, he reconsidered and reinvestigated the matter, and adhered to his first conclusion, all question about his having in fact ascertained what the distances were should be laid aside. It matters not that he was in error; the only point here is whether he ascertained and fixed the distances, and we deem it clear that he did; and, having done so, the question of distances was, in our view, finally closed between the claimant and the government, unless on one side or the other there was fraud, of which there is no pretense.

Had he fixed too long a distance, and the claimant been paid thereby, the government would have been as much entitled to recover back the excess paid him as he is to recover from it the alleged deficiency. The simple answer to either claim would be, that both parties agreed to abide by the ascertainment and fixation of distances made by that officer, and neither can overturn his action and substitute that of this court in the premises.

II. The claimant's second demand is connected with the diminution, while in transitu, of the weight of the supplies, caused by unavoidable shrinkage, wastage, or drying up of solid stores, and unavoidable leakage of vinegar, molasses, and other fluids. This diminution was found by boards of survey, organized as required by the contract, not to have been attributable to neglect or want of proper care on the part of the claimant; and their finding on that point is, by the terms of the contract, conclusive in his favor. The question in that connection is, not whether he is accountable to the government for the loss of weight in transitu, but whether he was entitled to be paid for the transportation of the entire number of pounds of supplies delivered to him at the place of departure, when he delivered all the supplies at the place of delivery,

but with unavoidable diminution of weight. He contends that he was so entitled; while the government claims that he should have been paid only for the actual number of pounds which the stores weighed when delivered by him at the place of destination, and that he should not be paid for the weight lost as before stated.

Were there in the contract nothing bearing on this point, we should have to decide it on general principles of law; but as the parties embodied there their agreement on the subject, we must be governed by
26 that. There are two clauses in the contract affecting this subject, the first of which is as follows:

"For loss of weight due to shrinkage, and for leakage of vinegar, molasses, or other liquids, the contractor shall not be held liable if the packages are delivered in good order and condition, and the board of survey shall be satisfied that such shrinkage or leakage did not arise from neglect or want of care on the part of the contractor or his agent."

The insertion of this provision in the contract shows that it was known to both the claimant and the contracting officer that stores transported over the routes embraced in the contract were subject to unavoidable shrinkage and leakage, and that they agreed upon a rule which should govern the rights and liabilities of the claimant in such case. That rule simply relieved him from liability to pay for the lost weight, if the board of survey should be satisfied that it did not arise from neglect or want of proper care on his part. It did not refer to the matter of payment or non-payment of freight on the weight lost by shrinkage or leakage. But we find another clause in the contract which seems to us to cover that point. It is as follows:

"Upon the arrival of the train at its place of destination or delivery, the officer of the Quartermaster's Department at the point of delivery shall indorse on the bill of lading, in accordance with the finding of a board of survey, as hereinafter provided, stating the quantity and condition of the stores delivered, upon which indorsement payment shall be made as per contract."

When it was thus stipulated that the officer should "indorse on the bill of lading the quantity of the stores delivered," and that the claimant should be paid upon that indorsement, and when he was, by other terms of the contract, to be paid according to the number of pounds transported, it is clear to us that the word quantity must be held to include not only the supplies shipped and transported, but also their weight when handed over at the place of delivery. If so, then the claimant agreed to receive pay of freight for just so many pounds as he actually transported to and delivered at that place, and no more. No other rule seems to us capable of just and practical enforcement. The shrinkage and leakage would, in the nature of the case, be gradual, beginning immediately after the shipment of the stores, and continuing throughout the whole period of their transportation, and neither party could in any way find out, except by daily unloading and weighing the stores, what the daily diminution of weight was. As such a daily proceeding was impracticable, it was impossible for either party to know, or even guess with any approach to accuracy, at what point on the route there was a diminution in weight of any given number of pounds, and therefore quite impossible to fix any sensible rule or devise any feasible plan by which the gradual loss of compensation might be accurately adjusted to the gradual loss of weight. That the claimant knew all this beforehand, and that the probable percentage of freight to be lost through the inevitable loss of weight was a matter of calculation entering into the rate of compensation he agreed to receive for work done under the contract, we think

there is no reason to doubt; and yet he took no pains to protect himself against such loss of freight, though he carefully guarded himself against responsibility for the value which he certainly foresaw would be lost through shrinkage and leakage not resulting from fault of his.

The fair conclusion from this is, that he was willing to bear that loss of freight, and to be paid only for the transportation of the number of pounds which he should deliver at the place of destination. This he has been paid, and in our judgment he cannot legally claim more.

27 III. The third demand of the claimant is for the sum of $608.99, which was, by the quartermaster who settled and paid his accounts, deducted from an amount due him, and is still withheld.

The finding sets forth fully the facts connected with this item. Briefly stated, they were these: The claimant's trains, proceeding from Fort Harker to Fort Sill, were by bad roads, bad weather, and swollen streams, delayed in arriving at the latter place long beyond the time contemplated by the contract for the journey; in consequence of which the post at Fort Sill became short in supplies, and the commanding officer there, to assist in hastening forward the stores, sent fifteen public mule-teams to meet the claimant's ox-trains, and bring supplies to the post more quickly than the latter could. The mule-teams took supplies from claimant's trains, and so relieved the post. In that service ten of those teams were out six days and five more out fourteen days, and for the forage and use of the teams and pay and rations of teamsters the quartermaster at Fort Sill charged the claimant the said sum of $608.99, which was retained from the claimant's subsequent earnings under the contract.

We are of the opinion that there was no authority for withholding that sum. The sending of the teams was not done at claimant's request, but was purely voluntary on the part of the officer at Fort Sill; nor did the contract require or authorize them to be sent in such case; nor did he therein agree to pay the government for such a service; nor were the teams and teamsters placed at Fort Sill to be, in effect, hired out at so much a day; nor did the teams, while on that service, cost the government, so far as appears, a dollar more than they would if they had remained at the post. There might possibly be found some words in the contract which might give the government some judicial recourse against the claimant under such circumstances, but none that should place him so entirely at the will of officers of the Quartermaster's Department as he would be if this transaction should be sustained.

Judgment for $608.99 in favor of the claimant will be entered.

NOTT, J., dissenting.

The contract here authorized the defendant's shipping-officers to make a requisition on the carrier for a wagon-train to carry whatever freight they chose to send. The defendants now, in effect, contend that they had a right to load such a train with molasses and vinegar in barrels, which the carrier had no right to inspect or object to, to be carried a distance of 166 miles, and that if, without fault of the carrier, and through defects in the defendant's barrels, the whole of the molasses and vinegar should leak away and be lost on the road, the carrier should lose his freight-earnings, and stand in the plight of having sent a train in his own wrong.

I am unable in this case to perceive any distinction between the government and an ordinary shipper of freight. The contract here does precisely what the law does in the case of an implied contract, and nothing more; it throws the loss of goods in transitu on the carrier if he

were in fault, and leaves him free from responsibility if he were not in fault. The provisions of the contract concerning boards of survey and payment do not affect the question now in dispute. They provided for the ascertainment of two facts: first, as to the quantity of freight lost; second, as to whether the loss was with or without fault on the part of the carrier. Upon those questions the findings of the boards of survey were conclusive upon the parties and are conclusive upon the court. But when the boards of survey had found in favor of the car-
28 rier, the contract did not make the quartermaster a final arbitrator to determine all remaining matters of construction; but, on the contrary, left the construction where ordinary contracts leave it, to the judgment of a court.

The contract being silent as to the freight-earnings in the case of leakages in transitu without fault on the part of the carrier, it is to be determined by the general rule of law in such cases. That rule it is unnecessary to discuss, as it has been laid down by the Supreme Court in an almost precisely similar case. I perceive, indeed, no difference whatever between this and the case of Nelson v. Woodruff (1 Black, 156), and there the Supreme Court held that the carrier should recover his freight-earnings on the goods lost as well as on the goods delivered.

Upon the other points in this case, viz, that the quartermaster was an arbitrator to determine the distance, and that the defendant's services in carrying a part of the contractor's freight were voluntary, I agree with the opinion of the court.

29 VIII.—*Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, on the fourth day of March, A. D. 1878, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Frank O. Kihlberg, claimant, do have and recover of and from the United States the sum of six hundred and eight dollars and ninety-nine cents.

30 IX.—*Application for and allowance of appeal.*

Now comes the said claimant, by his solicitor, and moves the court for the allowance of an appeal to the Supreme Court of the United States from the judgement of the court in this case.

HARVEY SPALDING.

Filed June 1, 1878.

And now, to wit, June 3, 1878, it is ordered that the appeal be allowed as prayed for.

31 In the Court of Claims.

FRANK O. KIHLBERG
vs.
THE UNITED STATES. } No. 9852.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusions of law thereon, of the several requests of the claimant and of

the defendants for additional findings of fact and the rulings thereon, of the opinion of the court and the dissenting opinion, of the final judgment of the court, of the application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this thirtieth day of October, 1878.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 956. Frank O. Kihlberg, appellant, vs. The United States. Court of Claims. Filed 30th October, 1878.

Supreme Court United States.

No. 956.

FRANK O. KIHLBERG

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

HARVEY SPALDING
Attorney for Appellant.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

No. 956.

FRANK O. KIHLBERG

vs.

THE UNITED STATES.

Brief for Appellant.

The controversy in this case is confined to the construction of the contract providing pay for service performed, the prescribed rate of which is for pounds-weight of supplies transported, per mile of transportation thereof. (Art. I, p. 3; art. XVII, p. 6; tabular statement, p. 7.) The appellant claims pay for all the pounds-weight transported for all the miles of transportation thereof, via the usual and customary route. The Court of Claims decided pay to be due only upon the *actual pounds-weight delivered* at the end of the overland journey, and for *only* the number of miles which the chief quartermaster of the department of the Missouri *designated*. (IV; findings 4, 5, 6, 7, 8, pp. 9, 10, 11; request, p. 12; conclusions of law, p. 12; opinion, pp. 13, 14, 15, 16.)

Between Fort Hays and Fort Dodge, and between Fort Hays and Camp Supply, the appellant transported 3,904,997 pounds of freight, actual weight when delivered, six miles and fifty chains, for which no payment has been made. (Findings 4, 5, 6, pp. 9, 10; request, p. 12.) The weight

of supplies transported exceeded the actual weight thereof when delivered as follows:

Between Fort Hays and Fort Dodge, 8,528 pounds. (Finding 5, p. 10.)

Between Fort Hays and Camp Supply, 4,785 pounds. (Finding 6, p. 10.)

Between Kit Carson and Fort Union, 9,007 pounds. (Finding 8, pp. 10, 11.)

Between Kit Carson and Fort Lyon, 762 pounds. (Finding 8, pp. 10, 11.)

Between Fort Harker and Fort Sill, 5,245 pounds. (Finding 8, pp. 10, 11.)

These differences in weight were ascertained by board of survey "to be attributable not to neglect or want of proper care on the part of the claimant, but to causes beyond his control, namely, unavoidable shrinkage, wastage, or drying up of solid stores, and unavoidable leakage" of liquids. (P. 10.)

WE ASSIGN AS ERRORS, CONCLUSIONS OF LAW 1 AND 2. (P. 12.)

ARGUMENT.

I.

To be just, courts give effect, if possible, to every part of a contract; and to give effect to one part of a contract, so as to render other parts inoperative, is manifest wrong, if all can have effect together.

The theory of the appellant, as to the meaning of the contract upon this point, is expressed in the words of the contract, namely: "Frank O. Kihlberg shall be paid * * according to the distance supplies are transported." (Art. XVII, p. 6.) "Transportation to be paid IN ALL CASES according to the distance from place of departure to that of delivery, * * by the usual and customary route."

The conclusion of law of the Court of Claims is based on

a theory diametrically opposed in all respects to the quoted language of the contract, namely, that the appellant was to be paid IN ALL CASES according to distances *estimated*, *designated*, and *fixed* by the chief quartermaster's department of the Missouri; and this theory is made to stand solely on the words, "the distance to be ascertained and fixed" by that officer, and they give effect to these words as if reading *the distance to be fixed*, &c., unlimited by the restraining words of the contract first quoted. This construction obliterates from the quoted clause the words "ascertained and," and the whole quoted context, and transforms the expressed meaning into a meaning which cannot be expressed without the use of words not found in the contract. Not only does the court obliterate the context, but they say, in effect, that the duty devolving on the officer specified gave him the power of absolute dictation over both parties. They say "that officer" * * "fixed the distances to be paid for," (p. 14,) and "that the claimant agreed to be paid for such distances ONLY," * * (p. 13,) and "had he fixed too long a distance, and the claimant been paid thereby, the government would have been as much entitled to recover back the excess paid as he is to recover from it the alleged deficiency. The simple answer to either claim would be, that both parties agreed to abide by the ascertainment and fixation of distances made by that officer." (P. 14.) So it appears, in plain terms, that the judgment of the court is that distances DICTATED, not distances TRAVELLED, were payable under this contract. Distance six per cent. less than air line was dictated. Suppose the officer had dictated distance twenty miles in excess of distance *travelled*, and the depot quartermaster had refused to pay more than the distance travelled. The Court of Claims, under their decision, would have been compelled to award transportation of twenty miles NEVER TRAVELLED, although the contract prohibits the payment of distances greater than by the "usual and customary route"! It may be true, that

an *over-payment* may be made under circumstances which will debar a recovery thereof, but an agent whose duty it is to communicate an *ascertainment* of distance of transportation cannot substitute therefor a "dictation" or "estimate," and force one party to pay for work never performed, or deprive another of pay for work done.

Miles are measured as pounds are weighed, and the only means to ASCERTAIN either is universally known. The word *ascertain*, applied to distance, can have but ONE meaning, namely, to find from measurements the correct distance. Of course, as nothing is perfect, there will be variations in measurements of the same roads, as there is in weights of the same article on different scales. The distance from point to point on a road may be ascertained by consulting one measurement or several, but no distance can be ascertained without one or more measurements; and in this case it was necessary that, *when ascertained*, it should be *fixed*,—that is, declared settled. It could be fixed *only by an ascertainment*, and an ascertainment could only be made *by consulting recorded measurements;* and when the court find that "it does not appear that prior to August 5, 1870, there had been any actual measurement of the road from Fort Hays to Fort Dodge, or from Hays to Larned," (third finding, p. 9,) and that the officer specified instructed the depot quartermaster, on the 16th of June, 1870, what distances to pay between these places, (findings 2 and 3, pp. 8, 9,) they affirm that said officer directed the payment for UNASCERTAINED distances; and the payment of unascertained distances binds neither party to this contract.

Suppose he had given no directions. The court say: "The mere perusal of this stipulation can leave NO QUESTION in the mind that the claimant agreed to be paid for such distances ONLY as should be ascertained and fixed by," &c. It is inferable from this—and the power to bind the parties to a fractional part of the distances travelled, as well as to duplicate distances travelled, attributed by the court

to the officer specified—that they were of opinion that the performance of the contract by appellant did not entitle him to pay, but that the so-called ascertainment and fixation did. The construction of the court goes at least this far: that appellant agreed to perform the work, and leave it to the officer specified to say how much he should be paid, and "both parties agreed to abide by" (p. 14) this measure, as they say. Obviously the rate of compensation specified, and the agreement about payment of transportation "in all cases according to the distance *travelled*," "supplies are transported," and "distance from place of departure to that of delivery," and about "usual and customary route," under such a construction, are without purpose or effect as to either party, and are binding on neither party. The whole case, as embodied in the opinion of the court, may, we think, fairly be summed up in this: Both parties committed the amount of compensation to be made for the service to be rendered to the officer specified, and it makes no difference how little or how much he awarded, if he was ignorant and honest. Fort Hays and Fort Dodge had fixed ascertained positions on the public surveys which exhibited the air-line distance between, as stated in the fourth finding. Therefore, when the officer specified undertook to designate a distance over a sinuous wagon road between these places six per cent. less than an air line, he must have been willfully ignorant, for we are not permitted to suppose that he was dishonest. Is it to be said, that distances which could have been *honestly* designated through blind ignorance of *ascertained facts* alone, is an execution of the requirement that "distances according to the distance from place of departure to place of delivery" should in all cases be ascertained and fixed by the officer specified? To affirm this, is to transform the deliberate, weighed words of the parties, each of which were exacted and required to be committed to writing, and to perform the function of declaring the agreed intent, into a travesty, and so make the parties and the contract ridiculous. The officer by whom the distances

travelled were to be ascertained and fixed, made and signed the contract for appellees, and in clear terms bound them to pay for the agreed service nine and one-half mills to fifteen mills—varying with each month—per mile for each one hundred pounds; (tabular statement, p. 7;) but the opinion of the court assumed that this contracting agent lawfully abrogated these exact prices, written in the contract, and substituted other prices, and that he might lawfully substitute therefor any price, great or small; for as "miles" are the unit of computing the value of the service, the power to dictate the number of miles for which payment should be made is in fact a power to dictate the value of the whole service.

At the date of appellant's contract, the plats in the office of appellee's agent, the Surveyor-General of the district of Kansas, at Lawrence, a few miles from Leavenworth, Kansas, as well as the ascertained longitude and latitude of all military posts in the office of every quartermaster of the army, exhibited the air-line distances stated in finding 4, (p. 9,) so that the designation of distances set forth in finding 2, (pp. 8, 9,) set up by the court as conclusive of the matter, but which the designating officer never intended to be binding on either party, (finding 3, p. 9,) was void from the beginning, because it was in defiance of known facts.

There are no words of the contract in restraint of the declared right of the appellant to be paid IN ALL CASES according to the ascertained distances from place of departure to that of delivery, and the whole power or discretion the officer specified could claim or exercise in the premises was to harmonize such unimportant variations as always arise in independent measurements of roads, and bind the parties, perhaps, as to such variations.

Upon this point, we simply insist, that the appellant, although entitled thereto, has not been paid according to the ascertained distance of transportation in the particulars set forth in the findings, which findings exhibit such distances.

We also claim that the chief quartermaster, department of the Missouri, did ascertain said distance *by air-line computation*, and fix the same at 85 miles between Hays and Dodge, which fact the Court of Claims was requested to find, but did not, (p. 12,) so that he is entitled to be paid according to the distances ascertained by the court, or according to distances ascertained and fixed by the officer specified.

II.

Appellant bound himself to "transport" ANY NUMBER OF POUNDS of military, Indian, and government stores and supplies, "from and between one hundred thousand POUNDS and ten millions of POUNDS in the aggregate," (arts. I and II, pp. 2, 3,) and he bound himself to "deliver" (art. I, p. 2,) all the pounds he "transported," EXCEPT the pounds lost without his fault, by unavoidable shrinkage and leakage of liquids; and it was agreed that the question of his fault as to such losses should be submitted to the judgment of boards of survey. The *damages* for losses of pounds *by his fault* were measured by the contract, namely, loss of freight thereon, and "double the cost at the point where he receives the articles." (Art. VIII, 2d paragraph, p. 4.) Appellant has paid the full agreed price for every fault attributed to him by the several boards of survey, and this much is forever settled. But he "transported" under several bills of lading a great amount of supplies, and delivered thereon all he agreed to deliver; but he has been paid for the actual weight delivered only, and NOT for the weight "transported." The difference in weight "transported" and weight "delivered," is set forth in the fifth, sixth, seventh, and eighth findings.

The service appellant undertook to perform was to "transport," (art. II, p. 3,) and appellee's undertaking was to pay "for the TRANSPORTATION of military, Indian, and government stores and supplies." (Tabular statement, p. 7.)

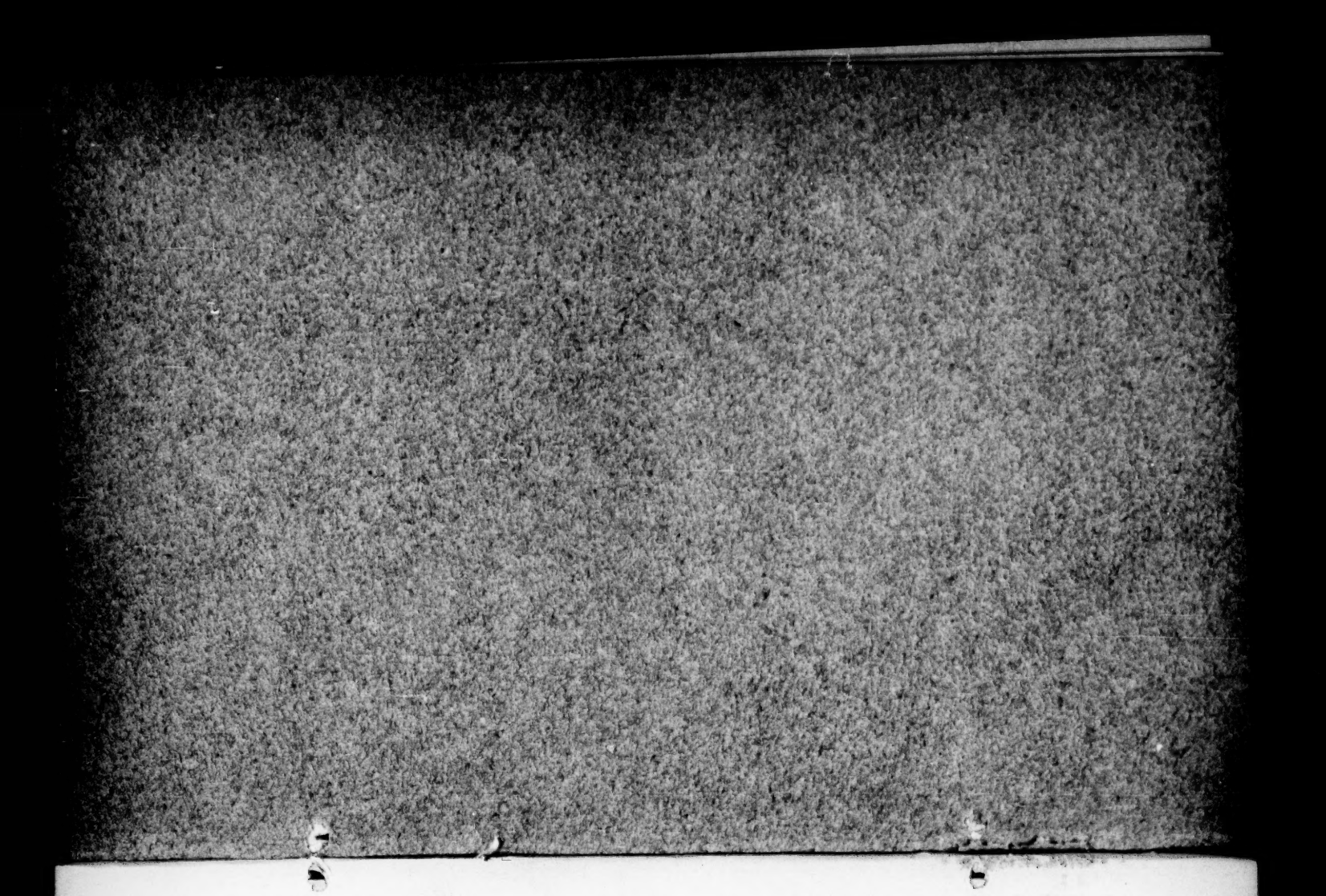
Appellant's undertaking is to "receive" and "transport" all that was turned over to him, (art. I, p. 2,) and to "deliver" all not lost from unavoidable cause, (art. VIII, p. 4,) so that his title to payment for all "transported" did not depend upon "delivery" of the whole weight, but upon delivery of the whole weight *less* the unavoidable shrinkage. This obligation is in accordance with law and equity; for when the appellant received a thousand sacks of bacon, weighing 100,000 pounds, and transported the same in good condition and unbroken several hundred miles, it was but equitable and just to pay for transportation upon all transported, although when delivered, from unavoidable cause, the actual weight was only 90,000 pounds. He who ships bacon or liquids on the plains takes the unavoidable losses in weight as a necessary part of the cost of transfer.

The error of construction of the contract upon this point, made by the Court of Claims, seems to be this: They thought the appellant's title to payment depended on the pounds-weight delivered; whereas the contract in express terms makes it depend upon the amount "transported," and in clear terms relieves him of the obligation to "deliver" all he "transported." And it was deemed necessary to justify this conclusion, as it seems, to find something *in the contract* to change the rule of *law* upon this subject, and accordingly the court assigns and relies upon as accomplishing this change a clause of article VII, (p. 4,) which article prescribes a mode by which the "delivery of the stores" shall be assured, and *the contractor aided in the* EXECUTION *of his agreement*, by and through *intermediate payments before* final delivery of the supplies, and of course it is specified that such payments shall be deducted from final payments. This clause is quoted in the opinion upon the middle of page 15, and the comments which follow ascribe to the word "quantity," the meaning of *actual pounds-weight on delivery;* and this attributed, unexpressed meaning, together with the requirement that the receiving officer

should indorse the same on the bill of lading, in connection with the other terms of the contract, by which he was entitled to be paid according to the number of pounds *transported*, the court affirm as the sole ground for the conclusion reached.

All that is said in article VII about final indorsements and payments, is wholly incidental to the specific thing provided by it, namely, the mode of intermediate payments. And, in expressed terms, *the particulars* as to mode and measure of final payments are referred to article VIII. The "indorsement" is to be made "in accordance with the finding of a board of survey, as HEREINAFTER PROVIDED" in article VIII; and the latter article declares: "These proceedings, a copy of which shall be furnished to the contractor, shall be attached to the bill of lading, and SHALL GOVERN the payments to be made on it."

In reply to the construction affirmed by the court, it is to be said, "quantity" does NOT mean "actual pounds-weight," and a statement of the number of articles delivered, number of packages, sacks, boxes, and so forth, was all that was *necessary* to be indorsed on the bill of lading under such requirement, for everything else requisite was necessarily exhibited in the attached proceedings of the board of survey, and the indorsement, whatever it was, WAS NOT to determine the payments to be made, but the *proceedings* of the board of survey, by positive declaration, were.

The debt due the appellant for miles and pounds of transportation not paid for has not been compromised, and appellees had, and have always had, notice of appellant's intention to prosecute his demand therefor, and he is entitled to judgment for the amount thereof as exhibited by the facts found.

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